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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

1988 TERM

JOHN BANKS ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

## PETITION FOR CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

The errors committed in the trial court were in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, in that (1) evidence of other crimes for which defendant had not been convicted was admitted; (2) prejudicial evidence was admitted without defense counsel's prior access to same; (3) a highly inflammatory statement was introduced against the Petitioner; and (4) defendant was not afforded effective assistance of counsel at either the trial level or the appellate level. The admission of the prejudicial material, coupled with ineffective

assistance of counsel, requires review of this case.

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## OPINION BELOW

The Supreme Court of the State of Mississippi entered its decision affirming the conviction of John Banks on December 16, 1987, Banks vs. State of Mississippi, Sup.Ct. No. 57,405. As of this date, the opinion of the Court has not been published.

## JURISDICTION

The Mississippi Supreme Court did not render a written opinion in Banks vs. State of Mississippi, Sup.Ct. No. 57,405, decided December 16, 1987; it affirmed the trial court's decision and entered a Mandate with the trial court on January 5, 1988. For the convenience of the Court, a typewritten copy of the Mandate is attached as Appendix "A."

Jurisdiction of the Court is invoked under 28 U.S.C. §1257(c).

CONSTITUTIONAL PROVISION INVOKED

Amendment V, United States Constitution.

> No person. . . , nor be deprived of life, liberty, or property, without due process of law;. . . .

Amendment VI, United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of ther State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense.

Amendment XIV, United States Constitution.

> . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

## STATEMENT OF THE CASE

On October 10, 1986, Petitioner, a licensed bailbondsman in the State of Mississippi, posted a $1,000.00 bond for Hugh Evan Brister and his wife. No initial payment was made by the Bristers on this bond. The conditions of the bond, as explained to the Bristers, were that they pay the Petitioner $100.00 within a week, then repay the balance due when possible, that they report for their trial date, and that they report to Petitioner's office once a week to sign in on their file. The Bristers acknowledged their understanding of these conditions.

On October 29, 1986, the Bristers had paid the $100.00, yet had failed to report to Petitioner's office, after repeated attempts by Petitioner to contact them by telephone and by visits to their home. Petitioner, along with an assistant, proceeded to the home of the Bristers, to obtain an explanation as to their failure to report in; otherwise, Petitioner was prepared to take them to jail and be released from their bond.

Upon Petitioner's arrival at the Brister home, he was confronted by Mr. Brister, who, after cursing the Petitioner and refusing to accompany Petitioner to his office, attacked Petitioner with a large stick, striking him on the head. After attempting to

strike Petitioner a second time, and after attempting to shut his door and slamming the door on Petitioner's knee, Petitioner drew his gun and fired twice, hoping to scare Brister. Brister fled to the rear of his house with the stick, with Petitioner following close behind. Petitioner fired three more times in the ceiling and floor, intending for Brister to stop. Brister was finally apprehended, handcuffed, and, after much resistance, placed in the trunk of Petitioner's automobile. Both Brister and his wife were transported to the City of Jackson, Mississippi, Police Department, where it was learned that they had been bound over to the Hinds County, Mississippi,

Sheriff's Office. The Sheriff's Office accepted Mrs. Brister, but refused to accept Mr. Brister due to an injury inflicted during his struggle with Petitioner. Petitioner took Mr. Brister to a bondsman's office and had Brister clean himself. While at the bondsman's office, Petitioner was arrested by the City of Jackson, Mississippi, Police Department, and charged with aggravated assault (said statute being attached hereto as Appendix "C").

Being a licensed bailbondsman, Petitioner, under Mississippi law, is allowed to use whatever force necessary to obtain violators (said statute being annexed hereto as Appendix "D"). On the

basis of this statute, Petitioner's primary defense was one of self-defense.

Petitioner's trial was held on January 8 through the 10th, 1987, in the Circuit Court of the First Judicial District of Hinds County, Mississippi. Petitioner's trial was frought with constitutional violations. First, the State attempted to introduce the front door of the Brister home. Petitioner had filed a discovery motion under Rule 4.06 of the Mississippi Uniform Criminal Rules of Circuit Court Practice (Appendix "E"), yet the State failed to notify Petitioner of the presence of this door, and allow him to examine the door, nor was Petitioner

allowed adequate time within which to examine the door. Petitioner made a timely objection to its use (Appendix "F"), yet was overruled. This constituted his second assignment of error and was violative of his Fifth Amendment and Fourteenth Amendment rights to due process. Secondly, evidence of a stolen rifle was allowed into evidence against Petitioner - evidence of a crime and/or bad acts for which Petitioner had not been convicted; upon Petitioner's objection, the lower court overruled same and allowed its introduction into evidence, in direct violation of Petitioner's Fourteenth Amendment due process rights (See Appendix "G"). Third, the lower

court allowed the introduction of a highly prejudicial statement alleged to have been made by Petitioner; the introduction of this statement proved to be more prejudicial than probative and its admission proved to be in direct violation of Petitioner's due process rights under the Fourteenth Amendment (Appendix "H"). Lastly, the Petitioner was afforded ineffective assistance of counsel in both the trial court and appellant court levels. His trial counsel failed to discover the presence of the front door, on his own questioning allowed the introduction of material prejudicial to the Petitioner, failed to object to the State's prejudicial contentions in their closing

arguments (Appendix "I"), improperly allowed in a prejudicial statement against Petitioner's interest, failed to investigate Petitioner's criminal record and its relation to his activities on October 29th (Appendix "J"), failed to investigate the Petitioner's possible lying under oath (Appendix "K"), failed to file a rebuttal brief and failed to timely file a Petition for Rehearing -- all in violation of Petitioner's Sixth and Fourteenth Amendment rights.

In Petitioner's Brief to the Mississippi Supreme Court, three assignments of error were presented.

PROPOSITION I.

IT WAS ERROR FOR THE TRIAL COURT NOT TO GRANT THE DEFENDANT A

MISTRIAL WHEN A WITNESS FOR THE STATE TESTIFIED THAT A STOLEN RIFLE WAS RECOVERED FROM THE TRUNK OF THE AUTOMOBILE OF THE DEFENDANT.

PROPOSITION II.

IT WAS ERROR FOR THE TRIAL COURT TO ADMIT THE DOOR INTO EVIDENCE SINCE THE STATE HAD FAILED TO PROVIDE THE DISCOVERY REQUIRED BY RULE 4.06 TO THE UNIFORM RULES OF CRIMINAL PROCEDURE.

PROPOSITION III.

IT WAS ERROR FOR THE TRIAL COURT NOT TO GRANT A MISTRIAL WHEN A WITNESS FOR THE STATE MADE A HIGHLY PREJUDICIAL AND INFLAMMATORY STATEMENT IN THE PRESENCE OF THE JURY.

Mississippi Supreme Court affirmed Petitioner's conviction, without written opinion (Appendix "A"). It is from this Mandate that the Petitioner respectfully requests this Honorable Court to review his conviction.

## ARGUMENT

Petitioner contends that the evidence admitted over his objection, by the trial court, improperly influenced the jury, thereby causing him to be wrongly convicted. Alternatively, the ineffective assistance of counsel at both the trial and appellate level resulted in a conviction for Petitioner, along with a denial of his fundamental rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

### EVIDENCE OF OTHER CRIMES FOR WHICH DEFENDANT/PETITIONER HAD NOT BEEN CONVICTED WAS ADMITTED.

While searching Petitioner's vehicle, pursuant to a warrant, on

October 29, 1986, police officers discovered in the trunk of Petitioner's automobile an AR-15 rifle, which upon further investigation, was found to be stolen. The investigating officers, photographing the automobile and its contents, made a photograph of Petitioner's trunk in which was included this AR-15 rifle.

Under cross-examination, the arresting officer, Patrolman Webb, stated that he found a "stolen" AR-15 rifle, to which Petitioner promptly objected and asked that the jury be instructed to disregard same, whereupon the trial court individually questioned each juror as to their ability to disregard such evidence (Appendix "G").

Photographs of this gun had been introduced earlier during the testimony of the arresting officer.

The introduction of testimony regarding a "stolen" gun found in Petitioner's automobile unduly prejudiced the Petitioner.

"Proof of a crime distinct from that alleged in an indictment is not admissible against the accused." Tobias v. State, 472 So.2d 398, 400 (Miss. 1985). The introduction of the evidence placed in the jury's mind that the Petitioner was possibly guilty of an unrelated crime; why would he not be guilty of the one for which he is being tried? The jury gave "excessive weight" to the evidence, thereby ". . .

divert[ing] [their] . . .attention. . . from the question of the [Petitioner's] responsibility for the crime charged to the improper issue of his bad character." U.S. v. James, 555 F.2d 992, 1000 (D.C.Cir. 1977), quoting U.S. v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968). "Even when the trial judge carefully instructs the jury regarding . . . evidence of other crimes, prejudice to the Defendant is 'well-nigh' inescapable." U.S. v. Carter, 482 F.2d 738, 740 (D.C. Cir. 1973), as cited in U.S. v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

Evidence of the stolen rifle unduly tainted the jury's mind against the Petitioner. The trial court's

questioning of the individual jurors as to their ability to disregard the evidence tended to underscore its weight and significance. The evidence was improperly admitted and was prejudicial to Petitioner's case, thereby violating his Fourteenth Amendment due process rights.

PREJUDICIAL EVIDENCE WAS ADMITTED WITHOUT DEFENSE COUNSEL'S PRIOR ACCESS TO SAME

Petitioner filed a pretrial discovery motion (Appendix "B") pursuant to Rule 4.06, Mississippi Uniform Criminal Rules of Circuit Court Practice (Appendix "E"). Contrary to this rule and the Mississippi Supreme Court's ruling in Hentz v. State, 489 So.2d

1386, 1388 (Mississippi 1986), the State presented evidence - the front door to the Brister home - without having notified the Petitioner of its existence nor having allowed Petitioner the opportunity, prior to trial, to examine it. Petitioner promptly objected to its introduction, with said objection being overruled (Appendix "F").

The Petitioner contends that the door presented evidence favorable to his version of the events of October 29, 1986, and that denial of same denied him possible exculpatory material.

The denial, by the State, of the opportunity to view this evidence is in direct contradiction to this Court's

ruling in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which "requires the State to disclose to the Defendant all favorable evidence material either to guilt or punishment." Barnes v. Lynaugh, 817 F.2d 336, 338-339 (5th Cir. 1987). "[The] State has a duty to provide an accused with all evidence in the State's possession materially favorable to the accused's defense." Moore v. Kemp, 809 F.2d 702, 719 (11th Cir. 1987). "Suppression of favorable, material evidence denies a Defendant's constitutional right to due process." Brogdon v. Blackburn, 790 F.1d 1164 (5th Cir. 1986), cert. denied, _____U.S.____ 107 S.Ct. 1985, 95 L.Ed. 2d 824 (1987)

as cited in Barnes v. Lynaugh, Supra.

The State's refusal to provide Petitioner with the door effectively denied him the opportunity to use exculpatory material. His review of the evidence prior to trial would have allowed him to obtain experts who may have countered testimony introduced by the State and supported Petitioner's version of the events of October 29, 1986, and as to the trajectory of the first two shots fired by the Petitioner. The State's actions resulted in a direct violation of Petitioner's due process rights under the Fifth and Fourteenth Amendments, for which Petitioner's cause should be heard by this Honorable Court.

## A HIGHLY INFLAMMATORY STATEMENT WAS INTRODUCED AGAINST PETITIONER

The Petitioner, while transporting the Bristers to the Jackson, Mississippi, Police Department, was allegedly to have responded to Mrs. Brister's staement that the Petitioner had almost killed her husband, "I wished I had killed the son of a bitch." (Appendix "H") when introduced on rebuttal, the witness, contrary to the State's earlier representations to the Petitioner and the Court, expounded on this statement (see Appendix "H").

The Petitioner initially objected to the introduction of the statement as not being proper rebuttal as it was not brought out on direct testimony, which the trial court overruled. When the

expounded statement was introduced, Petitioner immediately objected and requested that the jury be asked to disregard portions of the statement.

The statement by Mrs. Brister had no probative value in its introduction. It's sole purpose was to inflame the jury, causing undue prejudice to Petitioner. "Evidence which is incompetent and inflammatory in character carries with it a presumption of prejudice." Gallion v. State, 469 So.2d 1247, 1250 (Miss. 1985), citing Tudor v. State, 299 So.2d 682 (Miss. 1974). See also, U.S. v. Burton, 737 F.2d 439 (C.A.Tex.1985). In U.S. v. Reme, 738 F.2d 1156 (11th Cir. 1984), evidence thought to be prejudicial to

the Defendant was admitted, yet, throughout the trial the jury was cautioned as to the limited purpose of the evidence. It was also given three and one-half pages of instructions as to its limited purpose. The Petitioner here was only afforded a small notice to the jury, which did little, if anything, in protecting the Petitioner from the resultant prejudice.

As with the admission of the evidence of the stolen rifle, the Petitioner suffered irremediable harm to his due process rights under the Fourteenth Amendment. He would ask this Honorable Court for a review of his claim regarding the admission of this prejudicial evidence.

## PETITIONER WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the U. S. Constitution is aimed at providing a Defendant with a fair trial. Part of that fair trial includes the right to assistance of counsel. This right to effective assistance of counsel is based on the right to counsel itself. Evitts v. Lucey, 469 U.S. 387, 397, n.7 (1985).

Petitioner had retained counsel for his trial; the same counsel also presented his subsequent appeal to the Mississippi Supreme Court. Petitioner would contend that, in the alternative, if he had been afforded adequate representation by counsel at both the trial court level and at the appellate level, the resultant constitutional errors

would not have been present, and ". . . the trial court cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

The errors previously ennumerated in the Petition would have not occurred had Petitioner's trial counsel adequately investigated his case. The door would have easily been found prior to trial; it's location was known to all the prosecution and could have been known to Petitioner's counsel (Appendix "F"). The evidence regarding the stolen rifle could have been foreseen, without Petitioner's counsel "stumbling" over same on his cross-examination of the investigating officer. (Appendix "G"). The effect

of the inflammatory statement could have been lessened by early discovery and pretrial motions to exclude the evidence. The Petitioner's counsel failed to properly investigate Petitioner's prior criminal record and its relationship (brought out at trial) to his possession of a firearm on October 29 (Appendix "J"). His counsel failed to properly investigate and defend the State's contention that the Petitioner was lying under oath when he applied for his bonding license. (Appendix "K"). Counsel also failed to object to a prejudicial, and totally erroneous, remark made by the State in their closing argument (Appendix "I"). Finally, Petitioner's counsel failed to file a rebuttal brief to the State's

brief on appeal and failed to file a timely Petition for Rehearing.

The standards set forth in Strickland, Supra, are that (1) counsel's performance be deficient and (2) that the deficient performance have prejudiced the Petitioner. Strickland, Supra at 687. A review of the pertinent errors, and the appendices (set forth above) will be sufficient to show an ineffective assistance of counsel at the trial court level.

The failure to file a rebuttal brief, failure to file a timely Petition for Rehearing, coupled with a failure to properly note errors at the trial court level, resulted in ineffective counsel at the appellate level.

The Mississippi Supreme Court has held that there is a right to effective assistance of counsel on appeal. Irving v. State, 441 So.2d 846, 856 (Miss. 1983). This Court has upheld that right in Evitts v. Lucey, 469 U.S. 387 (1985).

The Petitioner was not afforded effective counsel at either the trial court or the appellate level. Failure to receive such resulted in prejudicial evidence being introduced against the Petitioner and in a failure to adequately defend against the State's charges. The failure of counsel at the appellate level resulted in a failure to protect Petitioner's claims of error before the Appellate Court and a failure to protect his subsequent appeal rights. For this reason the

Petitioner respectfully requests a review of his case by this Honorable Court.

## CONCLUSION

A full reading of the trial transcript supports Petitioner's contentions that without the multiplicity of error by the trial court, and the resultant violations of Petitioner's Fifth, Sixth and Fourteenth Amendment rights, Petitioner would not have been convicted. This Court should grant certiorari to review the Fifth, Sixth and Fourteenth Amendments violations committed by the Courts of Mississippi against John Banks.

Respectfully submitted,

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